No. 06-1005

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

EFRAIN SANTOS AND BENEDICTO DIAZ, RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT BENEDICTO DIAZ

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QUESTION PRESENTED

The principal federal money laundering statute, 18 U.S.C. § 1956(a)(1), makes it a crime to engage in financial transactions using the "proceeds" of certain specified unlawful activities with the intent to promote those activities or to conceal the proceeds. The question presented is whether "proceeds" refers to the gross receipts generated by the unlawful activities or only the profits, i.e., gross receipts less expenses.

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SUMMARY OF ARGUMENT

The money laundering statute's language, context, and legislative history all support an interpretation of the term "proceeds" as "profits," not "gross receipts." Moreover, insofar as any ambiguity remains after all relevant matters are considered, the rule of lenity requires the narrower "profits" interpretation.[1]

A. The government selectively quotes dictionary definitions of "proceeds" as "gross receipts," but when fully and fairly examined, dictionary definitions encompass both alternative meanings, "profits" as well as "gross receipts." Neither meaning clearly predominates over the other. Dictionaries, therefore, are inconclusive.

The government points to a variety of other statutes that use "proceeds" as meaning "gross receipts," but those statutes operate in different contexts and

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[1] 18 U.S.C. § 1956 provides in relevant part:

(a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity—

(A)(i) with the intent to promote the carrying on of specified unlawful activity . . . ; or

(B) knowing that the transaction is designed in whole or in part—

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity . . .

shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both.

for different purposes. Congress's use of various terms—including "proceeds," "gross receipts," "gross revenue," and "gross proceeds"—has been unsystematic at best. Notably, the government overlooks the use of "gross revenue" (a synonym for "gross receipts") in the U.S. Code provision that immediately precedes the money laundering statute—18 U.S.C. § 1955, the illegal gambling statute, which defines the predicate offense in this very case. The existing reference to "gross revenue" in Section 1955 provided a conspicuous model for Congress when it created the money laundering offense in Section 1956, yet Congress avoided the term "gross revenue" (or "gross receipts") and chose "proceeds" instead. The government simply ignores that fact while venturing into other, more remote legislative contexts.

The government also ignores the context provided by the money laundering statute itself, and particularly its use of the word "promote." This case involves the statute's "promotion" branch, which prohibits transactions in "proceeds" "with the intent to promote the carrying on of specified unlawful activity." 18 U.S.C. § 1956(a)(1)(A)(i). Unlike the word "proceeds," "promote" has a clear, unambiguous meaning: to expand or increase. The meaning of "promote" conflicts with the government's argument that "promotion" money laundering encompasses expense payments that merely carry out or sustain the underlying illegal activity (for example, the redemption of winning bets or the payment of employee salaries in an illegal gambling enterprise). Expansion of a business takes place when funds that can be extracted from the business and deployed elsewhere—i.e., funds remaining *after* business expenses have been paid—are instead plowed back into the business

through reinvestment. Funds that remain after expenses have been paid are profits, not gross receipts.

The concept of expansion also is consistent with the "concealment" branch of the money laundering statute, which prohibits transactions designed "to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity." 18 U.S.C. § 1956(a)(1)(B)(i). Payments of routine business expenses are not designed to conceal the tainted nature, location, source, ownership, or control of the funds involved. Such payments actually tend to *widen* rather than conceal the trail that investigators can detect and follow back to the source, because the expenses in question are generated by, and hence directly connected to, the predicate offense. Consequently, a proper interpretation of the statute's "concealment" branch focuses on money that has been extracted from an unlawful business and placed elsewhere to conceal its source. Again, money that can be extracted from a business and placed elsewhere represents profits, not gross receipts.

B. An interpretation that focuses on profits rather than gross receipts is also supported by the money laundering statute's legislative history. The government conspicuously fails to address that history; it delves instead into the legislative histories of various other statutes that have no direct bearing on the question presented. The Congressional reports and floor debates regarding Section 1956 are replete with references to the "profits" of burgeoning criminal enterprises. Such enterprises were clearly the focus of Congress's concern, not "inept," profit-less criminals now hypothesized by the government. Br. 25.

C. As its final support for a "gross receipts" interpretation, the government cites two speculative and overstated concerns about the practical difficulties of proving profits in money laundering cases.

First, the government argues that criminals will avoid creating a paper trail (or will manipulate any existing trail) to frustrate proof of profits. But criminals have ample incentives to cover their tracks under any standard of proof, and the government has repeatedly demonstrated its ability to prosecute complex financial crimes successfully, despite sophisticated cover-ups. The government also suggests that records will be non-existent or inadequate by positing contrived hypotheticals involving violent crimes such as bank robbery. The government thus glosses over the fact that most money laundering cases involve non-violent, transactional offenses, which often leave a variety of records in their wake. The facts in this case vividly illustrate the point. The government recovered a trove of ledgers, betting slips, and other financial documents, including records maintained by the gambling enterprise's *accountant*. At a post-trial hearing, the government even estimated the profits realized by the enterprise (although the government never purported to show that profits were used in any money laundering transactions).

Second, the government speculates that a "profits" interpretation will force courts to develop an entirely new set of accounting methods and principles for illegal businesses. But legal and illegal businesses are no different in principle with respect to accounting issues; both types of enterprise raise similar questions concerning relevant time periods, relevant transactions, and appropriate accounting methods. As the government concedes, "there is no one, uniform set of accounting principles that applies in all

contexts, even for lawful businesses." Br. 33. In fashioning money laundering charges, the government has broad discretion to define the relevant activities and to select any reasonable accounting method for proving profits. Indeed, the profits of criminal enterprises are routinely established in sentencing and forfeiture proceedings.

D. While speculating about its own burdens under a "profits" interpretation, the government ignores the very real and unjustifiable burdens its "gross receipts" interpretation imposes on defendants. The government's position effectively merges money laundering with the underlying offense in a wide range of cases and thus ratchets up sentences automatically. In illegal gambling cases, for example, the government's position converts every instance of illegal gambling into a money laundering offense and consequently *quadruples* the available sentence, from 5 years to 20 years. Nothing in the money laundering statute's language, context, or legislative history suggests that Congress intended such draconian results. The absurd consequences of the government's position militate strongly against its acceptance.

E. Given all of the preceding considerations, the government has failed to show that its "gross receipts" interpretation is "unambiguously correct." *United States* v. *Granderson*, 511 U.S. 39, 54 (1994). Thus, even if a "profits" interpretation remains uncertain as well, the rule of lenity requires that narrower interpretation.

ARGUMENT

The Money Laundering Statute's Language, Context, And Legislative History Support The Interpretation Of "Proceeds" As "Profits," Not "Gross Receipts." Insofar As Any Ambiguity Remains, The Rule Of Lenity Requires The Narrower "Profits" Interpretation.

The issue presented here was first addressed specifically in *United States* v. *Scialabba*, 282 F.3d 475 (7th Cir.), cert. denied, 537 U.S. 1071 (2002). There the Seventh Circuit arrived at the common-sense conclusion that "proceeds" in the money laundering statute should be limited to profits—i.e., funds remaining after the payment of expenses—because "otherwise the predicate crime merges into money laundering (for no business can be carried on without expenses) and the word 'proceeds' loses operational significance." 282 F.3d at 475. Other circuits have expressly disagreed with *Scialabba* but have not undermined its reasoning. See *United States* v. *Grasso*, 381 F.3d 160, 166-68 (3d Cir. 2004), vacated and remanded on other grounds, 544 U.S. 945 (2005); *United States* v. *Iacaboni*, 363 F.3d 1, 4 (1st Cir.), cert. denied, 543 U.S. 978 (2004); see also *United States* v. *Huber*, 404 F.3d 1047, 1058 (8th Cir. 2005).

The statute's language, context, and legislative history all support an interpretation of "proceeds" as meaning "profits" rather than "gross receipts." That conclusion is buttressed by the fact that, as *Scialabba* pointed out, the government's position leads to an improper merger of money laundering with the underlying offense. Insofar as any uncertainty remains, the rule of lenity requires a resolution in favor of the narrower "profits" interpretation.

A. The Money Laundering Statute's Language And Context Support A "Profits" Interpretation Of "Proceeds"

1. The Government's Selected Dictionary Definitions Are Incomplete And Inconclusive

The government selectively quotes several dictionary definitions to establish that the essential meaning of "proceeds" is "gross receipts." Br. 13-14. When fully and fairly examined, however, dictionary definitions demonstrate that "proceeds" may just as easily mean "profits."

For example, the Oxford English Dictionary's definition (tied to the singular noun form) reads in full: "That which proceeds, is derived, or results from something; that which is obtained *or gained* by any transaction; produce, outcome, *profit*. Now almost always in *pl.* **proceeds**." 12 OXFORD ENGLISH DICTIONARY ("OED") 544 (2d ed. 1989) (first two emphases added). The government misleadingly states that the OED "lists the 'gross receipts' meaning of 'proceeds' first." Br. 14. In fact, the OED's definition, just quoted in full, encompasses both meanings in virtually the same breath (and does not use the words "gross receipts" at all).[2]

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[2] As the first recorded reference to "proceeds," the OED cites Samuel Pepys's diary entry for December 11, 1665: "£350,000 sterling was coined out of the French money, the proceeds of Dunkirke." 12 OXFORD ENGLISH DICTIONARY 544. France had ceded Dunkirk to England in 1658; England sold it back to France in 1662. 4 CHAMBERS ENCYCLOPAEDIA 669 (rev. ed. 1973). "The purchase money was brought over in French coin and reminted at the Tower." A. Feavearyear, THE POUND STERLING: A HISTORY OF ENGLISH MONEY 95 (2d ed.

In this and other instances, the government quotes dictionary definitions of "proceeds" only partially, systematically omitting the alternative "profits" definition even when the two meanings are provided together or in close proximity. For example, the government omits Random House's alternative definition of "proceeds" as "the *profits* or returns from a sale, investment, etc." RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1542 (2d ed. 1987) (emphasis added). Likewise, the government omits Webster's alternative definitions of "proceeds": "the *net profit* made on something <took the [proceeds] from the sale of his business and invested in stocks>"; and "the *net sum* received (as for a check, a negotiable note, an insurance policy) after deduction of any discount or charges." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1807 (1993) (emphasis added).[3]

1963). It is unclear whether the amount stated by Pepys represents the total purchase price (gross receipts) or reflects an adjustment for transportation, reminting, or other costs (net profits). Thus, ambiguity in the term "proceeds" can be traced back to its first recorded usage (which involved, figuratively speaking, an instance of royal money laundering).

[3] In addition, the government inadvertently supports a "profits" interpretation by quoting definitions that incorporate the concept of "accrual." The government quotes Random House's reference to "something that results or *accrues*," and Webster's reference to "That which results, proceeds, or *accrues* from some possession or transaction." Br. 13, 14 (emphases added). The word "accrue," however, strongly connotes profit or gain. See, e.g., RANDOM HOUSE UNABRIDGED DICTIONARY 13 (2d ed. 1993) ("1. to happen or result as a natural *growth*, *addition*, etc. 2. to be added as a matter of periodic *gain* or advantage, as *interest on money* . . .") (emphasis added); 1 OXFORD ENGLISH DICTIONARY 90 ("1. To fall (*to* any one) as a natural growth

The linkage or close proximity of the two definitions is significant. In *Muscarello* v. *United States*, 524 U.S. 125 (1998), the Court turned first to the OED for guidance in construing the word "carry" in 18 U.S.C. § 924(c)(1) (which imposed a mandatory five-year sentence for "carr[ying]" a gun in connection with certain drug crimes). In adopting the government's definition, the Court emphasized that it was the first one provided by the OED while the defendants' narrower definition was a distant *twenty-sixth*. *Id.* at 128, 130.

No such disparity exists here. In contrast with *Muscarello*, the government's preferred definition of "proceeds" does not clearly predominate over the alternative. Even where dictionaries list a "gross receipts" definition first, a "profits" definition typically follows so closely that further interpretive tools must be applied. Consequently, as the Third Circuit concluded (in a case relied on by the government), dictionary definitions are "neither uniform nor dispositive" for purposes of construing the term "proceeds" in the money laundering statute. *Grasso*, 381 F.3d at 167; see also *Trustees of the Chicago Truck Drivers, Helpers & Warehouse Workers Union (Independent) Pension Fund* v. *Leaseway Transportation Corp.*, 76 F.3d 824, 828 n.4 (7th Cir. 1996) ("[T]he relative order of the common dictionary definitions of a single term does little to clarify that term's meaning within a particular context. When a word has multiple definitions, usage determines its meaning."); cf. *Moskal* v. *United States*, 498 U.S. 103, 116-17 (1990) (al-

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or increment, to come by way of addition or increase, or as an accession or advantage. . . . **2.** To arise or spring as a natural growth or result. . . . *Esp.* of interest: To grow or arise as *the produce of money invested*.") (final emphasis added).

though a common-law term generally carries its established meaning when used in a statute without further definition, that principle does not apply when the term has *more than one* common-law meaning: "we think it more appropriate to inquire which of the common-law readings of the term best accords with the overall purposes of the statute rather than to simply assume, for example, that Congress adopted the reading that was followed by the largest number of common-law courts").

2. The Government's Discussion Of Other Statutes Fails To Support Its Interpretation And Ignores The Critical Importance Of Context

This Court has recognized that where a statutory term does not have a clear, single meaning on its face, the next step is to consider its context. "[T]he meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used." *Deal* v. *United States*, 508 U.S. 129, 132 (1993). "Statutory construction is a holistic endeavor and, at a minimum, must account for a statute's full text, language as well as punctuation, structure, and subject matter." *United States Nat'l Bank* v. *Independent Ins. Agents of America, Inc.*, 508 U.S. 439, 455 (1993) (internal quotation marks and citations omitted).

a. The statute that immediately precedes the money laundering statute in the U.S. Code, 18 U.S.C. § 1955, defines the very "unlawful activity"—illegal gambling—that generated the supposed "proceeds" in this case. (Under subsection (c)(7) of the money laundering statute, "specified unlawful activity" includes the activities listed in 18 U.S.C. § 1961(1), which in turn includes "illegal gambling businesses" prohibited

by 18 U.S.C. § 1955.) Section 1955 defines an "illegal gambling business" as a business that "has been or remains in substantially continuous operation for a period in excess of thirty days or has a *gross revenue* of $2,000 in any single day." 18 U.S.C. § 1955(b)(1)(iii) (emphasis added). Section 1955 has incorporated that reference to "gross revenue" since the statute's enactment in 1970. It thus provided a conspicuous model when Congress created the offense of money laundering in the very next section of the U.S. Code. The opinion below draws specific attention to that language. Pet. App. 15a n.5. Nevertheless, apart from a single glancing reference when reciting the elements of illegal gambling generally (Br. 41), the government ignores the presence of "gross revenue" in Section 1955.

b. Other criminal statutes also use the term "gross revenue" or "gross receipts," thereby leaving no doubt as to Congress's intent. See, e.g., 18 U.S.C. § 225(a)(2) ("gross receipts"); 18 U.S.C. §§ 1511(b)(1)(iii) & (c) ("gross revenue"); 21 U.S.C. § 848(b)(2)(B) ("gross receipts"); 21 U.S.C. § 856(d)(1)(B) ("gross receipts"). The government overlooks these references. Instead, it concentrates on certain *forfeiture* provisions that appear to use "gross receipts" and "proceeds" interchangeably. Br. 18-20 nn.1&2. As the government's own summary shows, however, Congress has used "gross receipts," "proceeds," and other terms unsystematically in the forfeiture context. Congress has even used the term "*gross proceeds*" on several occasions. See Br. 19 n.2 (emphasis added).[4]

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[4] The government cites references to "gross proceeds" in the Anti Car Theft Act of 1992, 18 U.S.C. § 982(a)(5); the Health Insurance Portability and Accountability Act of 1996, 18 U.S.C. § 982(a)(7); and the Telemarketing Fraud Prevention Act of 1998, 18 U.S.C. § 982(a)(8).

"Gross proceeds," of course, is redundant on the government's theory. Moreover, the government promptly forgets these statutory references to "gross proceeds" when it argues that Congress understands *unmodified* references to "proceeds" as meaning "gross receipts" and therefore would have used a *modified* reference, i.e., "net proceeds," in the money laundering statute if it meant to denote something less than gross revenue. Br. 21. Congress's use of "gross proceeds" in other statutes suggests the opposite conclusion—that Congress understands the unmodified term "proceeds" as meaning something less than gross revenue.

Similarly, the government acknowledges—but then forgets—that at times Congress has included an *express definition* of the term "proceeds" to make clear that the term should be read on those occasions as referring to gross receipts. Br. 17-18.[5] Such definitions would be superfluous, of course, if the "primary" or default meaning of "proceeds" were "gross receipts."

Given Congress's varying and inconsistent use of the terms "proceeds," "gross revenue," "gross receipts," and "gross proceeds" across a wide range of statutes, the only conclusion that can be drawn is that the word "proceeds" has no fixed or predominant meaning apart from its function and context in a particular statute. The government points out that "Congress sometimes uses different words in different statutes even though it intends those words to have the same meaning." Br. 20. That is undoubtedly true. See, e.g., *Limtiaco* v. *Camacho*, 127 S. Ct. 1413,

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[5] The government cites 18 U.S.C. § 2339C(e)(3), an anti-terrorism provision; and 18 U.S.C. § 981(a)(2)(A), a civil forfeiture provision.

1419 (2007); *Deal*, 508 U.S. at 134. But the converse is equally true: Congress sometimes uses the *same* word in different statutes—or even in the same statute—to mean different things, depending on the context. "Most words have different shades of meaning, and consequently may be variously construed, not only when they occur in different statutes, but when used more than once in the same statute or even in the same section." *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U.S. 427, 433 (1932); see also *Environmental Defense* v. *Duke Energy Corp.*, 127 S. Ct. 1423, 1433 (2007) (the term "modification" had different meanings in different sections of the Clean Air Act); *General Dynamics Land Systems, Inc.* v. *Cline*, 540 U.S. 581, 595-96 (2004) ("age" had different meanings in different sections of the Age Discrimination Employment Act); *United States* v. *Cleveland Indians Baseball Co.*, 532 U.S. 200, 213 (2001) ("wages paid" had different meanings in different sections of 26 U.S.C.); *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 343-44 (1997) ("employee" had different meanings in different sections of Title VII).

c. By relying on *forfeiture* statutes in particular, the government underscores its disregard for context. The money laundering statute is an offense-defining provision, while forfeiture statutes provide a certain type of remedy for already-defined offenses. Even though "proceeds" has been used occasionally in both contexts, the government improperly assumes that the term operates as broadly when defining offenses as it does when describing assets subject to forfeiture. This Court has repeatedly rejected the simplistic notion that a statutory term has the same meaning in different contexts: "The tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purpose, has and

should have precisely the same scope in all of them, runs all through legal discussions. It has all the tenacity of original sin and must constantly be guarded against." *General Dynamics*, 540 U.S. at 595 n.8 (quoting Cook, *"Substance" and "Procedure" in the Conflict of Laws*, 42 Yale L.J. 333, 337 (1933)); see also *Environmental Defense*, 127 S. Ct. at 1432.

The illegal gambling statute, 18 U.S.C. § 1955, illustrates the difference between offense-defining and forfeiture provisions. As noted above, subsection (b) of that statute defines the offense of illegal gambling in part by requiring that the gambling business reach a certain "gross revenue" threshold (at least $2,000 generated in a single day). 18 U.S.C. § 1955(b)(1)(iii). On the other hand, subsection (d) of the same statute provides for forfeiture of "*[a]ny property*, including money, *used* in violation of the provisions of this section." 18 U.S.C. § 1955(d) (emphasis added). Here, rather than referring again to "gross revenue," Congress employed a broader term, "property . . . used," to describe the scope of the forfeiture. Under this broader provision, assets put to use in an illegal gambling business would be subject to forfeiture even if their acquisition was entirely lawful. See, e.g., *United States* v. *Premises Known as 318 South Third Street, Minneapolis, Minnesota, Hennepin County*, 988 F.2d 822, 824 (8th Cir. 1993) (forfeiture of building used in illegal gambling); *United States* v. *On Leong Chinese Merchants Ass'n Building*, 918 F.2d 1289, 1296 (7th Cir. 1990) (same), cert. denied, 502 U.S. 809 (1991); see also *United States* v. *Heldeman*, 402 F.3d 220, 222-23 (1st Cir. 2005) (forfeiture of doctor's personal residence used in connection with drug distribution offenses); *United States* v. *Bernitt*, 392 F.3d 873, 880-81 (7th Cir. 2004) (forfeiture of residence used in marijuana offenses), cert. denied, 544

U.S. 991 (2005); *United States* v. *Bieri*, 21 F.3d 819, 824 (8th Cir.) (forfeiture of farm property used in marijuana offenses), cert. denied, 513 U.S. 878 (1994).

Here and elsewhere, forfeiture provisions sweep more broadly than the definition of the associated offense. See also 18 U.S.C. § 981(a)(1)(A) (enacted with Section 1956 and providing for civil forfeiture of "[a]ny property, real or personal, involved in a transaction or attempted transaction in violation of section 1956 . . . or any property traceable to such property"); 18 U.S.C. § 982(a)(1) (enacted with Section 1956 and providing for criminal forfeiture of "any property, real or personal, involved in [an offense under Section 1956], or any property traceable to such property"); *Huber*, 404 F.3d at 1061 (under Section 982(a)(1), funds may be subject to criminal forfeiture "even if they were not part of the money-laundering transaction").[6]

3. The Government Ignores The Context Provided By Section 1956 Itself—Particularly The Word "Promote"

In disregarding the importance of context, the government also ignores the most immediate context of all—the language of Section 1956 itself, and par-

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[6] The government's reliance on *RICO* forfeiture provisions is inappropriate on another ground as well. Congress declared a special intent that RICO be "liberally construed to effectuate its remedial purposes." Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 947 (codified at 18 U.S.C. § 1961 note). Although the list of "specified unlawful activities" in the money laundering statute includes RICO violations (among many other offenses), the money laundering statute itself is not subject to a similar directive.

ticularly the term "promote." The government fails to say anything about the definition of *that* term and its relationship to "proceeds." The meaning of "promote" conflicts with the government's position that "promotion" laundering encompasses transactions that merely continue or sustain, rather than expand or increase, the underlying illegal activity.

a. Consider, for example, the Oxford English Dictionary's definition of "promote": "To further the *growth*, development, progress, or establishment of (anything); to help forward (a process or result); to further, advance, encourage." 12 OXFORD ENGLISH DICTIONARY 616 (emphasis added).[7] Thus, in the context of an unlawful enterprise, "promotion" means an expansion of the enterprise, not merely its continuation at the break-even point, much less at a loss. A "profits" standard gives the term "promote" its proper meaning by focusing the statute on transactions that involve a reinvestment of profits, i.e., funds that could be freely extracted from the business and diverted to other uses but instead are plowed back into the business to expand it. See, e.g., *Estate of Wallace* v. *Comm'r*, 965 F.2d 1038, 1040 (11th Cir. 1992) (farm business grew by "reinvesting profits in more cattle"). In many situations, one can apply a simple, common-sense test: if the transactions in question are essential to the mere *survival* of the business,

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[7] This is the OED's second listed definition, the one most applicable to activities, enterprises, or other impersonal subjects. The OED's first definition applies to human beings: "To advance (a person) to a position of honour, dignity, or emolument; *esp.* to raise to a higher grade or office; to prefer." 12 OXFORD ENGLISH DICTIONARY 616 (emphasis in original). Both definitions embody the same fundamental concept: movement to a higher level, not just continuation at the same level.

they do not constitute a "promotion" of the business. For example, paying winners and employees their due is essential to the survival of an illegal gambling enterprise—not to mention the survival of its proprietor. Neither the enterprise nor the proprietor is likely to last very long if the amounts owed are withheld and used for other purposes.

The government ignores this important distinction between promotion and mere continuation, repeatedly conflating the two. See, e.g., Br. 23 ("The payment of the expenses of a crime commonly promotes the *continuation and expansion* of the criminal enterprise") (emphasis added). As a supposed illustration, the government cites the Seventh Circuit's earlier decision in this case, on direct appeal, in which the court described the bolita's expansion in general terms as involving payments to runners, collectors, and winners. *United States* v. *Febus*, 218 F.3d 784, 790 (7th Cir.), cert. denied, 531 U.S. 1021 (2000) (see Br. 23). In *Febus*, however, the court was never asked to define "proceeds" in terms of profits or gross receipts. The issue did not surface until *Scialabba* and subsequent cases (*Grasso*, *Iacaboni*, and the collateral proceedings in this case).[8]

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[8] In *Febus*, respondent Santos sought to overturn his conviction on direct appeal by arguing that "his cash payments to the bolita's collectors and winners were essential transactions of the illegal gambling business, and thus cannot also constitute transactions under the promotion provision of the money laundering statute." 218 F.3d at 789. In rejecting that argument, the Seventh Circuit considered the "separate transaction" issue in isolation, without reference to the appropriate definition of "proceeds." See *id.* at 789-90. The latter question was not addressed until *Scialabba*, almost two years later. Now that the government has taken the position that "proceeds" encom-

Likewise, the issue was never addressed in the long list of cases cited by the government as involving convictions for "promotion" laundering based on "expense payments." Br. 23 & n.3. The government makes no attempt to show that the facts available in those cases would have failed to support convictions under an alternative "profits" standard. Thus, the government's claim that a "profits" standard would necessarily "foreclos[e]" all such cases is unsupported. Br. 23-24. The mere fact that the government did not try to meet that standard in a series of cases does not mean that any such attempts were doomed to failure. And, in any event, this Court has not hesitated to overrule a long line of lower-court decisions that erroneously expanded a criminal statute, even when the lower courts *expressly* addressed the issue. See, e.g., *McNally* v. *United States*, 483 U.S. 350, 359 (1987).

b. The government also mistakenly argues that a "profits" standard is inappropriate because it would foreclose prosecutions under the statute's "concealment" branch whenever the funds are "used to pay the expenses of the revenue-generating crime." Br. 26-27. The government's argument gives little or no meaning, however, to the concept of "concealment" in the money laundering context. Payments of routine business expenses, such as payments to bolita winners and employees, are not designed to conceal the tainted source or nature of the funds involved. The statute requires knowledge that "the transaction is designed in whole or in part . . . to conceal or disguise

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passes even routine expense payments, it is appropriate to consider whether that position improperly undermines the "separate transaction" requirement. The government acknowledges the importance of this issue by discussing it at length. See Br. 36-42; see also Part D, *infra*.

the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity." 18 U.S.C. § 1956(a)(1)(B)(i). By definition, expenses are generated by and thus directly connected to the underlying offense. If anything, expense payments tend to *widen* the trail that investigators can detect and follow back to the source. Here, for example, the indictment listed the dates and precise amounts of salary payments to respondent Diaz, which were traceable back to the printing business that allegedly served as a front for the bolita. See Indictment pp. 11-12, *United States v. Jose Almeda et al.*, No. 2:96CR44 (N.D. Ind. May 10, 1996); see also *United States* v. *Rudisill*, 187 F.3d 1260, 1262-63, 1267 (11th Cir. 1999) (payroll and other expense payments aroused suspicion and led to discovery of defendants' fraud scheme); *United States* v. *King*, 169 F.3d 1035, 1039-40 (6th Cir.) (payments to couriers provided evidence of drug trafficking scheme), cert. denied, 528 U.S. 892 (1999).

Thus, a proper interpretation of the statute's "concealment" branch focuses on funds that have been extracted from an unlawful business and placed elsewhere to conceal their connection to the business. Again, money that can be extracted from a business and placed elsewhere typically represents profits, not gross receipts. See, e.g., *United States* v. *Esterman*, 324 F.3d 565, 570, 573 (7th Cir. 2003) (in "concealment" cases, "the mere transfer and spending of funds is not enough to sweep conduct within the money laundering statute"; "it is important, even if difficult at times, to ensure that the money laundering statute not turn into a 'money spending statute'"); see also *United States* v. *Garcia-Emanuel*, 14 F.3d 1469, 1475 (10th Cir. 1994) ("cases involving *invest-*

ments made with illegal proceeds are close to the core of the statute's purpose") (emphasis added).

In sum, a "profits" interpretation fits best with the meaning of the statute's two key concepts, "promotion" and "concealment." On the other hand, the government's "gross receipts" interpretation conflicts with the clear meaning of "promotion" and improperly broadens "concealment" to include routine expense payments. At the very least, it cannot be said that the statute's language and context *unambiguously* support the government's position.

B. The Legislative History Of The Money Laundering Statute Supports A "Profits" Interpretation Of "Proceeds"

While venturing far afield into other legislative realms, the government says nothing about the legislative history of Section 1956 itself. The government declares that a "profits" interpretation "would constrict the money laundering statute in significant ways that Congress could not have intended," but it fails to cite anything in the legislative history that establishes this supposed "intent." Br. 22. Instead, the government posits a series of artificial hypotheticals and simply *assumes* that Congress intended to cover all of them. The government's assumptions about Congressional intent are contradicted by numerous statements in the statute's legislative history.

Section 1956 was enacted as part of the Money Laundering Control Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207. The legislation was developed by the Senate Judiciary Committee as S. 2683. The Committee's report identifies Congress's fundamental concern: "The growth of money laundering has been a corollary of the spread of *profitable* illegal enterprises." S. Rep. No. 99-433, 99th Cong., 2d Sess. at 2

(1986) (emphasis added). The report goes on to note a statement by the Committee's chairman, Sen. Thurmond: "Creation of a money laundering offense is imperative if our law enforcement agencies are to be effective against the organized criminal groups which *reap profits* from unlawful activity by camouflaging the proceeds through elaborate laundering schemes." *Id.* at 9 (emphasis added); see also *United States* v. *Castellini*, 392 F.3d 35, 49 (1st Cir. 2004) ("It is clear from the legislative history that Congress's purpose in enacting § 1956 was to close the gap in the criminal law with respect to the post-crime hiding of the ill gotten gains") (internal quotation marks omitted); *United States* v. *Johnson*, 971 F.2d 562, 569 (10th Cir. 1992) (same). Similarly, the Congressional floor debates repeatedly refer to the use of illegal *profits* as the evil to be addressed.[9]

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[9] The following are only a selection of the many statements that focus on profits (all emphases added): 131 Cong. Rec. E2864 (daily ed. June 18, 1985) (statement of Rep. McCollum) ("As drug trafficking has increased in this nation, so have the number of seemingly legitimate business persons devoted to moving drug *profits* through the banking system"; "the purpose of money laundering is *to make illegal profits appear as legitimate income*"); 131 Cong. Rec. S8592 (daily ed. June 20, 1985) (statement of Sen. Thurmond) (the legislation "would severely restrict the ability of criminal groups to *disguise and profit from illegal gains*"); 132 Cong. Rec. H408-01 (Feb. 6, 1986) (statement of Rep. Lungren) (money launderers use banks, brokerage houses, and other financial institutions "to hide their illegal *profits*"; "crime chieftains are using a variety of techniques and a variety of locations to inject their *profits* into the American financial system"); *id.* (statement of Rep. Meyers) (money laundering "is a process by which criminals can take their illegal *profits* and give them the appearance of being earned legitimately"); 132 Cong. Rec. H408 (daily ed. Feb. 6, 1986) (statement of Rep.

As the legislative history makes clear, Congress acted in response to an alarming expansion of criminal enterprises, and the corrupt infiltration of legitimate businesses, through the deployment of illicit profits. Congress was not concerned with the payment of routine business expenses—for example, the redemption of winning bets and salary payments in an illegal gambling enterprise—and it certainly was not concerned with the marginal cases now hypothesized by the government, such as the "inept criminal who never manage[s] to earn a profit." Br. 25.

Notably, the government itself has acknowledged the statute's profit-oriented approach. The Department of Justice told Congress in 1996:

> Congress constructed these new money laundering statutes [18 U.S.C. §§ 1956 and 1957] to apply not only to those who generate criminal proceeds but to all those who engage in a financial or monetary transactions [sic] with the requisite knowledge that the proceeds involved were derived from illicit *profits*. These statutes are intended to curb the flow of illicit *profits* back to the unlawful enterprises that created such proceeds. Thus, this process is designed to prevent the *capitalization and expansion* of criminal activity . . .
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McCollum) ("If we can get at the *profit*, if we can make it too expensive for the big money, organized criminals to get involved and to continue this high-level operation, we can make a very significant impact on the entire process"); 132 Cong. Rec. S14270 (daily ed. Sept. 30, 1986) (statement of Rep. DeConcini) ("we will make it more difficult for drug dealers to keep the *profits* of their criminal activities").

> In general, the money laundering statutes are to be used to identify and prosecute the financial component of *for-profit* criminal activity, including attempts to *conceal or reinvest* criminal proceeds. They should not be used in cases where the money laundering activity is minimal or incidental to the underlying crime . . . .

U.S. Department of Justice, *Report for the Senate and House Judiciary Committees on the Charging and Plea Practices of Federal Prosecutors With Respect to the Offense of Money Laundering* 5, 14 (June 17, 1996) (emphasis added).

C. The Government's Predictions That A "Profits" Interpretation Will Create Intractable Evidentiary And Accounting Problems Are Unsubstantiated

The government predicts that a "profits" standard will create a host of "practical problems" for money laundering prosecutions. Br. 27-35. Its predictions, however, remain abstract and hypothetical. The government apparently has never tried to meet a "profits" standard in actual money laundering cases. The government simply asks the Court to assume that prosecutions that succeed under the "gross receipts" standard will systematically fail under a "profits" standard. Although profits may be more difficult to prove in particular cases, that by itself is not a sufficient reason to expand the scope of this (or any other) criminal statute beyond the limits indicated by its language, context, and legislative history. Moreover, the government sells itself short. Its ability to overcome problems of proof in much more complicated cases has been demonstrated repeatedly. In fact, the government routinely establishes the profits gener-

ated by illegal enterprises in other contexts such as sentencing and forfeiture.

1. The Government Overstates The Evidentiary Problems In Money Laundering Cases And Ignores The Real-World Circumstances In Which Such Cases Often Arise

The government argues that criminal enterprises rarely keep complete and accurate financial records. Br. 28-29. That argument, however, proves far too much. The incentive to avoid creating a paper trail, or to manipulate whatever trail is created, exists in every criminal case. Indeed, criminals who act on that incentive often *bolster* the government's case. For example, "concealment" money laundering requires proof of a design to "conceal or disguise." 18 U.S.C. § 1956(a)(1)(B)(i). The government has acknowledged elsewhere that proof of the design element actually becomes *easier* when money launderers take elaborate steps to avoid creating a paper trail: "the more convoluted the transaction, the easier it is to infer a design to conceal or disguise." Brief for the United States in Opposition at 11, *Cuellar* v. *United States*, No. 06-1456 (filed Aug. 3, 2007); see also *United States* v. *Ness*, 466 F.3d 79, 81 (2d Cir. 2006) (proof of the design element turns on the "level of secrecy" involved and gains support from techniques such as avoidance of a paper trail and use of coded communications), cert. petition pending, No. 06-1604. In addition, the Sentencing Guidelines specifically provide a two-level enhancement for "sophisticated laundering," defined as "complex or intricate offense conduct pertaining to the execution or concealment" of the money laundering offense. U.S. Sentencing Commission, *Guidelines Manual* § 2S1.1(b)(3) & cmt. n.5(A) (West 2007) ("Guidelines").

In case after case, the government has shown its ability to prosecute complex financial crimes even when criminals employ the most sophisticated techniques to cover their tracks. See, e.g., *United States* v. *Nguyen*, 2007 WL 2083708, at *1 (5th Cir. July 23, 2007) (affirming money laundering convictions arising from "complicated" real estate mortgage scheme); *United States* v. *Gotti*, 459 F.3d 296, 338 (2d Cir. 2006) (affirming money laundering convictions where money transfers were "highly complex and surreptitious"), cert. denied, 127 S. Ct. 3001 (2007); *United States* v. *McClain*, 377 F.3d 219, 220-21 (2d Cir. 2004) (affirming money laundering convictions arising from "elaborate" and "complicated" fraudulent investment scheme); *United States* v. *Jackson-Rudolph*, 282 F.3d 369, 375, 387 (6th Cir. 2002) (affirming money laundering conviction arising from "sophisticated scheme"); *United States* v. *Prince*, 214 F.3d 740, 750-53 (6th Cir.) (affirming money laundering conviction arising from elaborate wire fraud scheme designed to avoid paper trail), cert. denied, 531 U.S. 974 (2000).

Nevertheless, the government predicts that records will be inadequate in money laundering cases while telling the Court virtually nothing about the real-world circumstances in which such cases typically arise. For example, the government repeatedly relies on contrived hypotheticals involving *bank robbery*. Br. 27, 29-30, 31, 37, 40. That is clearly not the type of crime that Congress had in mind when the money laundering statute was enacted, as shown by the legislative history discussed above. Nor is bank robbery the type of crime that figures prominently in real-life money laundering schemes. (Indeed, the government's brief fails to cite a single money laun-

dering prosecution in which bank robbery was the underlying offense.)[10]

Actual money laundering cases are overwhelmingly associated with non-violent, transactional offenses such as embezzlement, bank fraud, and counterfeiting, in which ongoing activity tends to generate business records or other financial evidence. A comprehensive study issued by the Department of Justice in 2003 shows that "violent offenses"—defined as bank robbery and kidnapping—were involved in only 1.6% of the money laundering cases brought under Section 1956 in 2001 (the most recent year examined). U.S. Department of Justice, Bureau of Justice Statistics, *Money Laundering Offenders 1994-2001*, at 6, Table 2 (2003), http://www.ojp.usdoj.gov/bjs/pub/pdf/mlo01.pdf (last visited Aug. 18, 2007). In stark contrast, transactional offenses accounted for the vast majority of money laundering cases. Almost half (47.1%) arose from pure "property offenses," e.g., embezzlement, bank fraud, bankruptcy fraud, and counterfeiting—the largest single category by far. *Id.* The study also shows that the majority of money laundering cases were generated by agencies within the Department of the Treasury, particularly the U.S. Customs Service and the Internal Revenue Service.

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[10] At one point, the government makes the bizarre suggestion that Section 1956 must apply to unprofitable activities because "a profitable bank robbery may be accomplished without violence, while an unprofitable one may involve the murder of a bank guard or a customer." Br. 27. In the latter case, of course, the primary concern of everyone—Congress, courts, prosecutors, and society at large—would be murder, not money laundering. Prosecutors have ample tools besides the money laundering statute to deal with violent but "unprofitable" crimes.

Id. at 4. Those agencies tend to generate cases in which documents abound.[11]

Likewise, records abounded in this case. The government recovered a trove of "ledgers," "betting sheets, betting slips, cash, and other evidence of [defendants'] illegal Bolita." Pet. App. 19a, 20a. It even recovered the records maintained by the bolita's *accountant*. See Brief for the United States at 5, *Benedicto Diaz* v. *United States*, No. 05-2316 (7th Cir.) (filed June 21, 2005). The government has never even attempted to demonstrate that the records here were inadequate to support the basic calculations necessary to prosecute the case under a "profits" standard. In fact, at a post-trial custody hearing, the government purported to estimate the bolita's profits. See Tr. 2180-81, *United States v. Jose Almeda et al.*, No. 2:96CR44 (N.D. Ind. Oct. 16, 1997). (However, the government never purported to prove any *money laundering transactions* involving profits. It is undisputed that the only transactions at issue in this case involved gross receipts.)

Other money laundering cases exhibit a similar abundance of records. See, e.g., *Huber*, 404 F.3d at 1053 (defendant's bookkeeper surrendered records establishing "the allocation of expenses and income" involved in the conspiracy); *United States* v. *Ables*, 167 F.3d 1021, 1025 (6th Cir.) (records of illegal bingo operation), cert. denied, 527 U.S. 1027 (1999); see

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[11] The reported figures address cases in which money laundering was the "lead" or "most serious" offense charged. In 2001, all government agencies combined made a total of 1,437 referrals to U.S. Attorneys for prosecution under Section 1956 or other money laundering statutes. Such referrals represented 1.2% of the total referrals received by U.S. Attorneys for all offenses. *Money Laundering Offenders 1994-2001*, at 2-3, 4 (Table 1).

also *United States* v. *Turner*, 400 F.3d 491, 498 (7th Cir. 2005) ("voluminous" bank records); *United States* v. *Griffin*, 84 F.3d 912, 927 (7th Cir.) (records of cocaine distribution business), cert. denied, 519 U.S. 999, 1020 (1996); *United States* v. *Tibolt*, 72 F.3d 965, 968 (1st Cir. 1995) (records of drug business), cert. denied, 518 U.S. 1020 (1996); *United States* v. *Restrepo*, 936 F.2d 661, 664 (2d Cir. 1991) (records of drug ring).

The government cites two cases as illustrating the failure of criminals to keep adequate records. Br. 28. Neither, however, has even anecdotal value. In *Stinnett* v. *Iron Works Gym/Executive Health Spa, Inc.*, 301 F.3d 610 (7th Cir. 2002), a Title VII sexual harassment case, the Seventh Circuit affirmed summary judgment for the defendant, an alleged "prostitution spa," because there was insufficient evidence that the business met the statutory threshold of 15 employees. The court merely noted that the spa's employment records were "sketchy." *Id.* at 612. This was a remark about the record in a particular case that could have applied just as easily to a legitimate business. No money laundering was involved, and the court did not discuss any evidentiary difficulties specific to illegal enterprises.

The government's other cited case, *United States* v. *Smith*, 31 F.3d 1294 (4th Cir. 1994), cert. denied, 513 U.S. 1181 (1995), is similarly unpersuasive. The court upheld the admissibility of wiretap evidence in a drug trafficking case, relying in part on the assertion in an officer's affidavit that the wiretap was necessary because drug traffickers' records are often abbreviated or code-based. 31 F.3d at 1299. Again, the case did not involve money laundering and did not address the sweeping assertions now made by the government about the availability of records gener-

ally. Indeed, if *Smith* is relevant at all, it suggests that wiretap evidence may fill evidentiary gaps in money laundering cases just as it does in drug cases. Congress expressly anticipated as much. The Senate Report that accompanied Section 1956 points out that wiretap evidence may play an important role in money laundering prosecutions: "[T]he bill makes the new money laundering offense in 18 U.S.C. § 1956 a predicate offense for other Federal offenses and, quite importantly, the authority for a wiretap, which will be useful for law enforcement agencies in detecting and prosecuting this new offense." S. Rep. No. 99-433, at 22.[12]

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[12] The government also cites a footnote in *Grasso*, which remarks that "criminals rarely keep records." Br. 33 (citing 381 F.3d at 169 n.13). The court, however, disclaimed that remark as a basis for its decision. *Id.* In addition, the government cites *United States* v. *McHan*, 101 F.3d 1027, 1042 (4th Cir. 1996), cert. denied, 520 U.S. 1281 (1997), which notes that a "profits" standard would "create perverse incentives for criminals to employ complicated accounting measures to shelter the profits of their illegal enterprises." Br. 28. As discussed above, however, money launderers already have ample incentives to cover their tracks, whatever the evidentiary standard. Furthermore, *McHan* involved a forfeiture provision, 21 U.S.C. § 853(a)(1), which *by its terms* made clear that more than profits were covered. See 101 F.3d at 1041. The court also pointed out that Congress had specifically instructed courts "to construe the statute liberally to effectuate its remedial purpose." *Id.* at 1041 (citing 21 U.S.C. § 853(o)). No such instruction applies here. Finally, the court held in the alternative that gross receipts were forfeitable under 21 U.S.C. § 853(a)(2), which covered all "property used, or intended to be used," to facilitate certain offenses. *Id.* at 1042-43.

2. The Government Overstates The Accounting Problems In Money Laundering Cases And Overlooks Sentencing And Forfeiture Cases In Which Profits Are Routinely Established

The government argues further that a "profits" interpretation imposes an unworkable burden because "there are no generally accepted accounting principles for criminal enterprises," and courts will be required to develop from scratch "an accounting theory for illegal businesses." Br. 29. The government then hypothesizes a "host of difficult and novel questions" involved in determining a criminal enterprise's profits, including questions about "the relevant accounting period"; the method for matching income and expenses ("cash," "accrual," or "some combination of the two"); and the applicability of GAAP or other accounting principles. Br. 29-32.

Such variables, however, are unavoidable in accounting systems generally, and they arise with respect to both legitimate and illegitimate enterprises. The government concedes that "there is no one, uniform set of accounting principles that applies in all contexts, even for lawful businesses." Br. 33. As a practical matter, the government has broad control over the choice of accounting variables when it drafts indictments or complaints. It can choose the relevant transactions and time period and can aggregate or segregate transactions as long as they constitute one of the many instances of "unlawful activity" listed in Section 1956(c)(7). Cf. *United States* v. *Miller*, 22 F.3d 1075, 1077 (11th Cir. 1994) (in illegal gambling cases, the government can allege that a particular defendant performed "any necessary function in the gambling operation, other than that of a mere bettor").

The government also can choose any reasonable accounting method as the basis for its proof. This Court has stated: "Accountants long have recognized that 'generally accepted accounting principles' are far from being a canonical set of rules that will ensure identical accounting treatment of identical transactions." *Thor Power Tool Co.* v. *Comm'r*, 439 U.S. 522, 544 (1979). Thus, corporate transactions are subject to any "reasonable" accounting treatment chosen by management. The same principles apply to the government. See, e.g., 26 U.S.C. § 446 (granting Internal Revenue Service broad discretion in choosing an appropriate accounting method to reconstruct income in tax evasion cases, where taxpayer has failed to adopt a particular method); see generally R. Anthony, D. Hawkins, K. Merchant, ACCOUNTING: TEXT & CASES 9 (12th ed. 2007) ("accounting principles do not prescribe exactly how each event occurring in an organization should be recorded").

In addition, the government need not calculate profits with precision; it need only show that *some* profits were involved. Cf. *United States Dep't of Housing & Urban Development* v. *Cost Control Marketing & Sales Management of Va., Inc.*, 64 F.3d 920, 925 (4th Cir. 1995) (government need only prove a "reasonable approximation" of profits resulting from violation of federal real estate disclosure law),), cert. denied, 517 U.S. 1187 (1996); *United States* v. *Beard*, 222 F.2d 84, 89 (4th Cir.) ("It has been recognized in gambling cases and in other cases of tax evasion that it is impossible for the Government to prove the exact amounts of unreported income, and that to require precision in computing the profits from an elaborately concealed business would be tantamount to holding that skillful concealment is an immovable barrier to

proof") (citing *United States* v. *Johnson*, 319 U.S. 503, 517-18 (1943)), cert. denied, 350 U.S. 846 (1955)).

Although more precise calculations may be necessary in sentencing and forfeiture proceedings, there the government typically carries a lighter burden of proof under the preponderance standard. The government *routinely* proves criminals' profits in such proceedings, thus demonstrating that courts are fully capable of identifying and applying the necessary accounting principles (which are unaffected by the burden of proof).

For example, courts calculate profits to determine sentences for bribery and public extortion offenses. See Guidelines § 2C1.1 cmt. n.3 (where "[a] $150,000 contract on which $20,000 profit was made was awarded in return for a bribe; the value of the benefit received is $20,000."); *United States* v. *Quinn*, 359 F.3d 666, 679-80 (4th Cir. 2004) (reversal required where district court calculated gross value of contract rather than net value); *United States* v. *Sapoznik*, 161 F.3d 1117, 1119 (7th Cir. 1998) (government must prove amount that bribes contributed to gambling operation's profits, not gross receipts); see also *United States* v. *DeVegter*, 439 F.3d 1299, 1303-04 (11th Cir. 2006) (calculating profits under Guidelines § 2B4, which cross-references § 2C1 and covers bank loan and other commercial bribery); *United States* v. *Landers*, 68 F.3d 882, 885 (5th Cir. 1995) (same); see also *United States* v. *Glick*, 142 F.3d 520, 525-26 (2d Cir. 1998) (net profits required under Guidelines § 2E5, which cross-references § 2C1.1 and covers pension fund bribery); but see *United States* v. *Pena*, 268 F.3d 215, 219 (3d Cir. 2001) (gross revenue is appropriate measure of net benefit), cert. denied, 536 U.S. 960 (2002).

Likewise, courts calculate profits to determine upward departures for fraud sentences. See, e.g., *United States* v. *Kimball*, 291 F.3d 726, 734-35 (11th Cir. 2002) (per curiam) (measuring defendant's net gain as basis for departure); *United States* v. *Andersen*, 45 F.3d 217, 222-23 (7th Cir. 1995) (profits were appropriate measure for calculating departure).

In the Seventh Circuit, courts also calculate profits under RICO's criminal forfeiture provision, 18 U.S.C. § 1963(a)(3). See, e.g., *United States* v. *Arthur*, 2006 WL 2992865, at *7 (E.D. Wis. Oct. 18, 2006); *United States* v. *Dote*, 150 F. Supp. 2d 935, 943 (N.D. Ill. 2001); see generally *United States* v. *Genova*, 333 F.3d 750, 761 (7th Cir. 2003); *United States* v. *Masters*, 924 F.2d 1362, 1369-70 (7th Cir.), cert. denied, 500 U.S. 919 and 502 U.S. 823 (1991).

In sum, there is ample precedent for the calculation of profits in the criminal justice system. The government's professed concerns about the difficulty of proving profits in the money laundering context remain unsupported.

D. The Government's Position Improperly Conflates The Predicate Offense—Here, Illegal Gambling—With Money Laundering And Automatically Ratchets Up Sentences Enormously, Without The Slightest Proof That Congress Intended Such Draconian Results

In a wide range of cases, the government's "gross receipts" interpretation improperly merges money laundering with the underlying offense. That in turn leads automatically to an enormous and unwarranted increase in available prison sentences—in illegal gambling cases, from 5 years to 20 years. 18 U.S.C. §§ 1955(a), 1956(a)(1). A "profits" interpretation, on the other hand, reliably implements the necessary

distinction between money laundering and the underlying offense and thus avoids the radical inflation of prison sentences.

The purpose of the money laundering statute is not to "afford an alternative means of punishing the prior specified unlawful activity." *Johnson*, 971 F.2d at 569 (quoting *United States* v. *Edgmon*, 952 F.2d 1206, 1214 (10th Cir. 1991), cert. denied, 500 U.S. 1223 (1992). The government concedes that Section 1956 requires "a separation between the conduct that constitutes the predicate crime and the conduct that constitutes money laundering." Br. 36. Moreover, the government does not dispute that a "profits" standard reliably achieves that separation. It argues, however, that other means can achieve the same result under the "gross receipts" standard.

Two problems undermine the government's position. First, the government's preferred method of avoiding the "merger" problem often yields indeterminate results and makes no economic sense. Second, with respect to gambling cases in particular, the government fails to offer any justification for the enormous increase in prison sentences that its position entails.

1. The government's approach to the merger problem is to shift attention from the "proceeds" requirement to another statutory element—the requirement of a "distinct transaction." Br. 36-42. Even the government's own hypotheticals, however, show that this approach fails to provide a consistent solution for the merger problem. The government argues, for example, that there are no "proceeds" from a bank robbery "until the bank has been robbed"; thereafter, when the robber uses the loot "to pay his accomplices, the payments are distinct from the conduct constituting the robbery." Br. 37. But suppose that, by advance

agreement, the robber keeps the contents of the vault while the accomplices pay themselves by keeping whatever they find at the cashiers' windows. Under the government's approach, a subsequent payment is money laundering but the contemporaneous payment is not; it is bank robbery, the predicate offense. The government's distinction makes no sense because the economic results are identical.

An analogous question arose in *Scialabba*: whether a slot machine or other gambling mechanism that collects bets and makes payouts to winners *automatically*, without the intervention of human hands, is simultaneously a gambling and a laundering device. The government's position now is that all payouts to winners (and payments to employees) are separate transactions that constitute "promotion" laundering offenses, regardless of how the payments are effected. See Br. 40-42. But during oral argument in *Scialabba*, the government recognized the absurdity of that position in mechanized gambling cases and sensibly admitted that mechanical payouts to winners do *not* involve "proceeds" under the money laundering statute. *Scialabba*, 282 F.3d at 477. That admission, of course, cannot be limited to mechanical payouts. The same holds true for payouts (and all other expense payments) made by human hands.

Yet another illustration of the confusion inherent in the government's position appears in *Huber*, which ostensibly supports the government's position but in fact undercuts it. See Br. 7-8. In *Huber*, a farmer fraudulently obtained government farm subsidies and crop-insurance payments by purporting to lease parts of his farm to co-conspirators. 404 F.3d at 1051-52. The Eighth Circuit announced its acceptance of the "gross receipts" interpretation, at least in the forfeiture context. *Id.* at 1058-59 ("even if the expenses

were legitimately incurred by Huber, they would not reduce the amount subject to forfeiture" under 18 U.S.C. § 982(a)(1)) (citing *Grasso*) (emphasis omitted). Thus, the court upheld the forfeiture of gross receipts of *legitimate* crop sales funneled through the bank accounts of Huber's stand-ins, without a reduction for legitimate crop-production costs. *Id.* at 1058 (noting that the government sought forfeiture of such receipts on a "commingling" theory). The court then turned to amounts fraudulently obtained from government-subsidized crop insurance programs. Here the court decided to limit any forfeiture to the *net* amounts obtained by the stand-ins; it excluded certain insurance premiums (i.e., expenses) owed by the stand-ins that the insurer withheld from the payouts. The court ruled that the withheld amounts "were never received by" the stand-ins and thus "were not part of the corpus of the money-laundering conspiracy." *Id.* at 1059, 1060. The court evidently failed to notice that whether an expense payment occurs before, during, or after a particular transaction makes no economic difference.

Similar examples could be multiplied indefinitely. They show that reliance on the "distinct transaction" requirement fails to eliminate the merger problem inherent in the government's interpretation of "proceeds." The government's approach also causes confusion by ensnaring the courts in metaphysical questions concerning which aspects of an ongoing enterprise are transactionally distinguishable from others. The "profits" test avoids such metaphysical questions and distinguishes transactions by practical reference to the nature of the funds involved. It looks at economic reality rather than metaphysics. Determining whether a transaction involved "profits" may at times involve its own difficulties of proof (as do many other

legal tests), but the question itself is simple and concrete.

2. The government's approach not only fails to solve the merger problem consistently. It *creates* the problem consistently—by ensuring that every instance of illegal gambling also constitutes an instance of money laundering. On the government's view, money laundering occurs whenever a gambling business pays winners or employees. Virtually any activity that qualifies under the illegal gambling statute, 18 U.S.C. § 1955, will meet the government's test. Consequently, the available prison sentence jumps automatically from 5 years for illegal gambling to 20 years for money laundering, a fourfold increase. 18 U.S.C. §§ 1955(a), 1956(a)(1).

Such results are unjustifiable as a matter of statutory language, legislative intent, public policy, and simple fairness. Courts recognize that the money laundering statute is particularly susceptible to unfair use as a tool for ratcheting up sentences far beyond those specified for the underlying crime. See, e.g., *United States v. Montague*, 29 F.3d 317, 318 (7th Cir. 1994) ("an aggressive United States Attorney can use the money laundering statute" to extract "more draconian sentences" than the underlying crime entails); see also *United States v. Conley*, 37 F.3d 970, 979 (3d Cir. 1994) ("Congress did not enact money laundering statutes simply to add to the penalties for various crimes in which defendants make money").

The government has failed to cite any evidence that Congress intended to give prosecutors a fourfold increase in the sentences they can seek in every illegal gambling case. The absurdity of that result militates against the government's "gross receipts" interpretation and supports a "profit" interpretation, which avoids the problem consistently. This Court

has expressed its "reluctance to increase or multiply punishments absent a clear and definite legislative directive." *Busic* v. *United States*, 446 U.S. 398, 406-07 (1980) (quoting *Simpson* v. *United States*, 435 U.S. 6, 15-16 (1978)); see also *Chapman* v. *United States*, 500 U.S. 453, 476-77 (1991) (Stevens, J., dissenting) ("There is nothing in our jurisprudence that compels us to interpret an ambiguous statute to reach such an absurd result. In fact, we have specifically declined to do so in the past, even when the statute was not ambiguous, on the ground that Congress could not have intended such an outcome.")

Furthermore, this Court will not endorse an overbroad interpretation of a criminal statute in reliance on its narrower application through prosecutorial fairness or discretion. See *Baggett* v. *Bullitt*, 377 U.S. 360, 373-74 (1964) ("It will not do to say that a prosecutor's sense of fairness and the Constitution would prevent a successful . . . prosecution for some of the activities seemingly embraced within the sweeping statutory definitions"); see also *Keyishian* v. *Board of Regents*, 385 U.S. 589, 599 (1967) ("It is no answer to say that the statute would not be applied in such a case"); see also *United States* v. *Wells*, 519 U.S. 482, 512 n.15 (1997) (Stevens, J., dissenting) ("It is well settled that courts will not rely on 'prosecutorial discretion' to ensure that a statute does not ensnare those beyond its proper confines").

E. When All Considerations Are Taken Into Account, The Government's "Gross Receipts" Interpretation Remains Uncertain, And Thus The Rule Of Lenity Requires A Narrower "Profits" Interpretation

All of the preceding considerations lead to one conclusion: the money laundering statute's applica-

bility to "gross receipts" is at best ambiguous, and therefore a narrower "profits" interpretation is required by the rule of lenity. The rule of lenity holds that "where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant." *United States* v. *Bass*, 404 U.S. 336, 348 (1971); see also *Cleveland* v. *United States*, 531 U.S. 12, 25 (2000). "[B]efore a man can be punished as a criminal under the Federal law his case must be plainly and unmistakably within the provisions of some statute." *United States* v. *Gradwell*, 243 U.S. 476, 485 (1917); see also *McNally*, 483 U.S. at 359-60; *Heflin* v. *United States*, 358 U.S. 415, 419 (1959) ("we resolve an ambiguity in favor of lenity when required to determine the intent of Congress in punishing multiple aspects of the same criminal act").

The government notes that the rule "'comes into operation' only 'at the end of the process of construing what Congress has expressed.'" Br. 42 (quoting *Callanan* v. *United States*, 364 U.S. 587, 596 (1961)). There is no disagreement on that point. There is also no disagreement that the rule of lenity operates only when a substantial doubt remains after all other applicable canons of construction have been exhausted. When such a doubt remains, however, this Court has not hesitated to apply the rule in recognition of the fundamental values it protects:

> [The rule] is founded on two policies that have long been part of our tradition. First, a "fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear." Second, because of the seriousness of criminal penalties, and because criminal punishment usually

> represents the moral condemnation of the community, legislatures and not courts should define criminal activity.

Bass, 404 U.S. at 348 (citations and footnote omitted).

The rule of lenity applies when "a reasonable doubt persists about a statute's intended scope." *Moskal*, 498 U.S. at 108; see also *United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218, 231 (1952) (the rule applies when the statute "cannot be said to be decisively clear on its face one way or the other"). "[W]here text, structure, and history fail to establish that the Government's position is unambiguously correct," this Court will "apply the rule of lenity and resolve the ambiguity in [the defendant's] favor." *Granderson*, 511 U.S. at 54.

The government's "gross receipts" interpretation of Section 1956 falls short of being "unambiguously correct." The rule of lenity therefore requires application of the narrower "profits" interpretation.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted.

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